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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 570

JACK RABIN, doing Business as JACK RABIN FARMS,
Petitioner,

v.

LAKE WORTH DRAINAGE DISTRICT, a general drainage district, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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LAKE WORTH DRAINAGE DISTRICT, a general drainage district, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To the Honorable the Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Jack Rabin, doing business as Jack Rabin Farms, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida, entered September 16, 1955, affirming the judgment of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, filed December 17, 1954, which dismissed petitioner's complaint with prejudice.

OPINION BELOW

The opinion of the Supreme Court of Florida (App. 6a) has not been officially reported but is reported in 82 So. 2d. 353. (Adv. sheets Southern Reporter October 20, 1955). The Opinion on Rehearing Granted (App. 13a) is not reported.

JURISDICTION

The judgment sought to be reviewed was entered July 1, 1955, (App. 6a) rehearing was granted July 27, 1955 and the Court adhered to its first opinion in an Opinion on Rehearing Granted filed September 16, 1955. (App. 13a)

Jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257, which provides, in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * * *
>
> (3) By Writ of Certiorari ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution ..."

The Supreme Court of Florida is the highest court of that state.

QUESTIONS PRESENTED

1. Does the failure of the legislature to act in authorizing suit to be brought against a State agency contravene the common law which provides a remedy for every wrong and the constitutional guaranties of Sections 4 and 12 Declaration of Rights, Constitution

of Florida and the Fourteenth Amendment to the Federal Constitution?

2. Is the destruction of private property by a State agency in the commission of a trespass or a tort a deprivation of property without due process of law under Section 12 Declaration of Rights Constitution of Florida and the Fourteenth Amendment to the Federal Constitution where a complaint for restitution against such agency is dismissed because of sovereign immunity to suit?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4, Declaration of Rights, Constitution of Florida, Vol. 25 Fla. Statutes Ann. 1941, p. 518:

> "Section 4. All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right, and justice shall be administered without sale, denial or delay."

Section 12, Declaration of Rights, Constitution of Florida, Vol. 25 Fla. Statutes Ann. 1941, p. 590:

"Sec. 12. No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation."

Section 22, Article III, Constitution of Florida, Vol. 25, Fla. Statutes Ann. 1941, p. 912:

"Sec. 22. Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating."

Portions of the General Drainage Law, Sec. 298, Vol. 12, Fla. Statutes Ann. 1941, p. 349 is copied in the Appendix (App. 13a).

STATEMENT OF THE CASE

Petitioner, a farmer, filed a complaint against respondent, Lake Worth Drainage District, alleging that he had planted peppers on land adjoining a canal maintained by the District. The District as part of its maintenance program in order to destroy weeds and hyacinths glutting the canal caused the canal to be sprayed without notice with a highly dangerous chemical herbicide known as "2-4-D", which was blown upon petitioner's plants and which contaminated the water that petitioner was then using for irrigation of his farm. As a result of the operation, petitioner's crop was damaged and largely destroyed.

There were three counts in the complaint, one based on negligence, one on trespass and one on the unlawful taking of property. It was averred that as a condition precedent to the formation of the District, the landowners in the District pledged their lands as security for payment of expenses of maintaining the District and its improvements, Sections 298.01 Florida Stat-

utes 1941, and that the damage to petitioner was the result of fulfilling the obligation.

The Lake Worth Drainage District was organized under the general drainage law of Florida, Sec. 298.01, supra, by the petition of land owners to the Court, for the purpose of improving and reclaiming their lands. It is maintained and operated by the landowners. It is not supported by state funds, its officers are not officers of the State of Florida. Neither the State nor the general public has any voice in its affairs. Public benefits are incidental and secondary.

The federal question was timely raised and considered. The third count of petitioner's complaint alleges:

> "That the defendant has damaged and taken the plaintiff's property without just compensation contrary to Section 12 of the Declaration of Rights of the Constitution of the State of Florida and contrary to the Fourteenth Amendment, Section 1 of the Constitution of the United States." (App. 4a)

See also the petition for rehearing (App. 12a) asserting that the damage to petitioner's property was a taking within the meaning of the Federal Constitution for which just compensation must be made.

The lower court in granting a motion to dismiss the complaint for failure to state a claim upon which relief may be granted has denied to petitioner the due process of law, guaranteed to him under both the State and Federal Constitutions.

The Supreme Court of Florida, in affirming the lower court, likewise passed upon, or rather over, petitioner's Constitutional rights, saying:

> "We revert to the decisions upon which the Appellant relies to support his contentions that his property has been taken without just compensation. In these cases the view was expressed that the constitutional guaranty that one's property may not be so taken cannot be thwarted by the lack of legislative authorization. It seems to us that this point was settled in this State thirty years ago, . . ."

The action of the lower court in dismissing petitioner's complaint was affirmed on Appeal, the Supreme Court of Florida saying in part:

> "Appellant's crop was not *taken* by the state agency, . . . It was destroyed and the destruction if negligent, constituted a tort. And it is the tort for which the Appellee is not under the law responsible because it was acting in a governmental capacity as a public corporation."

Justice Thornal, concurring specially, concurred for the reason that he did not believe the district could be coerced to pay the judgment, but stated further:

> "I do not agree that a drainage district under Chapter 298, supra, is either a state agency or is entitled to enjoy the immunities granted to state agencies."

ARGUMENT

The Supreme Court of Florida held that petitioner could not recover from the respondent because it was an agency of the government, against which no action could be brought. In addition, it held that petitioner's property was not taken without just compensation in in violation of the Fourteenth Amendment of the United States Constitution and Section 4, Declaration of Rights, Constitution of Florida. In so deciding, the

Court rendered a decision conflicting with those of this Court and with decisions in a majority of the states.

Under the decisions of this Court, destruction of a citizen's property by the government is a taking for which, under the Fifth and Fourteenth Amendments,[1] just compensation must be made. Sovereign immunity from suit does not protect governmental agencies from suits for just compensation because the provisions of the Constitution are mandatory and self-executing.

Contrary to the decision below, it is not necessary that property be absolutely taken in the narrowest sense of the word. As this Court said in *Pumpelly* v. *Green Bay Company*, 13 Wall 166, 177-8:

> "It would be ... [an] unsatisfactory result, if ..., it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it [has] not [been] taken for the public use."

See, also, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393; *Welsh* v. *Swasey*, 214 U.S. 91.

Thus it has been held that where the noise and glaring lights of planes landing at or leaving an airport leased to the United States interfered with the normal use of a neighboring farm as a chicken farm, there was a tak-

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[1] There is no basis for distinguishing the cases arising under the two Amendments in this regard. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 233, 236-7; *Sweet* v. *Rechel*, 159 U.S. 380, 398.

ing sufficient to give the owner a *constitutional* right to compensation. *United States* v. *Causby,* 328 U.S. 256.

In *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U.S. 327, it was held that firing guns across a citizen's land constituted a taking for which just compensation had to be made. Similarly, in *Richards* v. *Washington Terminal Co.,* 233 U.S. 546, this Court held that a corporation chartered by Congress to construct a tunnel and operate railway trains therein was liable for damages to an individual whose property was injured by smoke and gas forced from the tunnel. The damage was a taking.

In addition to the cases cited above see, *United States* v. *Lynch,* 188 U.S. 445; *United States* v. *Cress,* 243 U.S. 316; *United States* v. *Lee,* 106 U.S. 196.

No one has ever suggested, when there is a taking of property for which just compensation is due, that the State needs to create a special remedy. The provisions of the Constitution create the cause of Action. As the Supreme Court of Florida itself said in *State Road Department* v. *Tharp,* 146 Fla. 745, 1 So. 2d 868:

> "If a State agency can deliberately trespass on and destroy the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State for suit, then the constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding would raise administrative boards above the law and clothe them with an air of megalomania that would eternally jeopardize the property right of the citizens. It would reverse the order of democracy in this country and head it into a blind alley."

This is not a case involving consequential damages. *Meyer* v. *Richmond,* 172 U.S. 82; *Sauer* v. *New York,* 206 U.S. 536. It involves a taking—a destruction of petitioner's crops. Cases refusing recovery for consequential damage all involve the situation where there is a restriction on the use of private property. See *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 413-14.

It is respectfully submitted that the decision below does not give effect to the Fourteenth Amendment to the Constitution as expounded by this Court in the cases cited above. Because this decision is in conflict with those cases a writ of certiorari should be granted.

The court below's holding that the respondent drainage district is a state agency which cannot be sued in the absence of special legislation is of considerable importance. It is in conflict with the majority of recent decisions of other states.

For instance, in the recent case of *Tomasek* v. *State,* 248 Pac. 2d 703, Oregon, decided in September 1952, the Court upheld a judgment rendered against the Oregon State Highway Commission. In a very well reasoned opinion the Court said:

> "The constitutional right and protection given the owner of property by Article 1, Section 18, Oregon Constitution, is unquestionably self-executing. It is an absolute right, and, for its violation, the injured person may have his remedy in a common law action *in the absence of statutory provision therefor.* This remedy should not be, nor is it, dependent upon legislative action. *It is manifest that the legislature has no power to abrogate or deny a constitutional right, nor may a right that is constitutionally guaranteed be taken*

away or rendered negatory by failure of the legislature to act.

"The constitution having created the absolute right in the owner of property as against the State, such provision carried with it a waiver of immunity on the part of the State to actions prosecuted for damages for its violation." (Emphasis supplied.)[2]

In *Chick Springs Water Co.* v. *State Highway Department,* 159 S. C. 481, 157 S. E. 842, the South Carolina Court said:

"The basis of the decision of the trial judge was that this action is in effect against the state, and in no case can the state be sued without its consent. * * * There is however, one important exception to the rule: In actions against the state for compensation for property taken, the constitution itself gives consent for the state to be sued, and where the constitutional convention has given such consent, no act of the general assembly is needed for that purpose, nor is it in the power of that body to deny it for *'a constitutional provision shall never be construed as dependent for its efficacy and operation upon the legislative will.'* " (Emphasis supplied.)[3]

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[2] The provision of Oregon's Constitution, Article 1, Section 18, which was before that Court reads:

"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation."

[3] Article 1, Section 17 of the South Carolina Constitution reads:

"Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

Likewise in Virginia, in the case of *Swift & Co.* v. *City of Newport News,* 105 Va. 108, 52 S. E. 821, the Court said:

> "So that when the provisions of a Constitution, as does ours, no less than the provisions in the constitution of the State of West Virginia and Illinois, forbids damage to private property, and points out no remedy, *and no statute affords one,* for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." (Emphasis supplied.)

In the case of *Jones et al.* v. *Al Johnson Construction,* 300 N. W. 447, Minnesota, decided in 1941, an action was brought by owners of buildings against a sanitary district to recover for damages caused as a result of the district blasting with dynamite to construct a tunnel. The defendant contended that its construction was a lawful undertaking under the sovereign authority of the State. The Court held that the defendant was not so endowed and affirmed the judgment against the Sanitary District.

In the recent case of *Cooper* v. *Sanitary District No. 1,* 19 N. W. 2d. 619, Nebraska, decided in 1945, the Court squarely held:

> "A sanitary drainage district is liable for negligence in the construction and *maintenance* of its works." (Emphasis supplied.)

This was an action to recover damages to growing crops on certain land belonging to the plaintiffs on account of negligence in the construction and maintenance of drainage channels. The defendant contended

that it was immune to suit under the theory of sovereign immunity. The Court rejected this theory of the defendant and stated that the constitutional guarantees of the plaintiff may not be abrogated and affirmed a judgment for the plaintiffs. In a well considered opinion the court said:

> "The state is a sovereign and cannot be sued without its consent. Being a sovereign, it is presumed that it will do justice to its citizens without compulsion, and even the sovereign itself under our constitution cannot take or damage private property without compensation."
>
> "The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that public involuntary quasi corporations are mere political or civil divisions of the state, created by general laws to aid in the general administration of the government, and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. * * * Neither the state nor any part of it, is divided by the legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district * * * and the lands within the district are assessed to pay the whole cost on the theory that they alone are benefited. * * * The organization is not different in principal from the organization of cities, villages or towns under a general law, on a petition of a certain proportion of the legal voters within the territory. It is correct to say that a drainage district is a quasi corporation if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of a civil government.

In disposition of the question of liability of the district for damages for negligence it was said in the opinion:

> "The district chooses its own Board of Directors, and its work is done under its direction and supervision. It is given certain additional powers and privileges because the formation of the district 'will be for the public health, convenience and welfare'. It is given the power of eminent domain as are railroads and ordinary municipal corporations. In the conduct of their affairs they must not negligently injure others. If they do, they are liable for such injuries as cities and villages are."

In the recent case of *City of Atlanta* v. *Kenny,* 83 Ga. App. 823, 64 S. E. 2d. 912, decided in 1951, the Court in holding the City liable for damages in undermining the plaintiff's property stated:

> "The plaintiffs in error seemed to take the position that since the city of Atlanta did not actually appropriate or use any of the plaintiff's property, and that since there was no intention to destroy the plaintiffs' building, that no recovery can be had for its mere negligent or inadvertent or accidental destruction. This position is not tenable. While the authority of the City is to establish fire stations and appurtenances thereto for the purpose of providing the citizens with fire protection, is a governmental function and for mere negligence or errors committed by the officers or employees of the City in performing such function, the City is not liable, where the City damages or takes property of one as a result of the performance of such governmental function, a right of action under the constitution accrues."

See also *State* v. *Taylor,* 224 Mo. 393, 123 S. W. 892.

So it appears that under decisions of Oregon, South Carolina, Virginia, Minnesota, Nebraska, Illinois, Georgia, West Virginia and Missouri, similar provisions of State Constitutions are held to be self executing. The doctrine of sovereign immunity is limited and constrained by the requirement of just compensation, to the sovereign itself.

The recent case of *Griswold* v. *Town School District of Wethersfield,* 88 Atl., 2d. 829, Vermont, decided in 1952, discarded the doctrine of immunity from liability for a school district and upheld an action of tort. The Court used this language:

> "The defendant demurred to the complaint on the ground that it was required as a matter of law to take such measures as were necessary to get an adequate water supply for its Perkinsville School, and in so doing it was engaged in a governmental activity directly connected with the purpose for which it was created and thus it is immune from liability for the injuries claimed in the complaint to have been suffered.
>
> "The question is whether the complaint states a good cause of action as against the ground of the demurrer.
>
> "This doctrine of immunity from liability does not apply where the injury complained of is the taking of private property for public use without compensation. (Citing many cases)
>
> "This rule has been recognized and applied in our own cases.
>
> "It has also been recognized in cases having to do with *damage* to property but not with the taking thereof. (Citing Cases)
>
> "The liability under our constitutional provision is not dependent on negligence but on the

taking of private property and this unlawful taking gives the right of action.

"Moreover, it is difficult to find any good reason why there should be liability for a taking through no negligence but non-liability if the same taking is the result of negligence. Such a doctrine it seems to us would be most unjust and indeed a monstrous doctrine permitting a way for avoiding liability under the constitutional provision". (Emphasis supplied.)

In *Eingenburg* v. *Lincoln Lansing Drainage District*, 310 Ill. App. 179, 33 N. E. 2d. 906, decided in 1941, the Court held that a landowner might maintain an action against a drainage district for the overflowing of his land as a result of defective drainage. The Court in the course of its opinion stated that:

"The controlling question of law raised is whether a drainage district organized under the Farm Drainage Act can in the performance of its duties, negligently and wrongfully damage and destroy the property adjoining its right of way without liability for such damage. Appellant contends that because of the constitutional provision that private property cannot be taken or damaged for public use without just compensation and the further provisions that urges a remedy for every wrong and under the holdings of the Supreme Court of this State he is given a right of action under the facts proven in this case."

The Court affirmed the judgment of the lower Court against the Drainage District and in so doing approved and confirmed the holding of the case of *Bradbury* v. *Vandalia Levee and Drainage District*, 236 Ill. 36, 86 N. E. 163. The Court quoted with approval from its earlier decision in the case of *Bates* v. *Drainage Commissioners*, 273 Ill. App. 335, and said:

> "It seems to us that in burning off the weeds and brush on the right of way, the Commissioners of the Drainage District were pursuing their proprietary or private functions and are liable for damages caused by their negligent or wrongful acts."

In a very recent case, *Department of Highways* v. *Corey,* 247 S. W. 2d. 389, decided in Kentucky, March, 1952, the Court said:

> "The question is whether the State Highway Department, an arm of state sovereignty, is immune from an action sounding in tort where damage of such a nature has been inflicted upon real estate by the negligent acts of the department as to amount, in all practical effect, to a taking of property for public use without just compensation therefor."

There was presented the question in the cited case as to whether or not the physical damage was of such a nature as to amount to a taking of property for a public purpose without just compensation. On this point the Court quoted from the case of *Commonwealth* v. *Kelly,* 314 Ky. 581, 236 S. E. 2d, 697, and said:

> "The appellants argue that to show a taking of property, the petition must state facts from which the Court may infer a total ouster from possession, or at least a substantial deprivation of all beneficial use of the land affected. It seems to us, however, that an interference with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional burden on the landowner to maintain that use, is a taking of his property."

CONCLUSION

The extension of the doctrine of sovereign immunity to agencies such as has been done in the instant case would raise administrative boards above the law and would open the door to widespread destruction and damage whereby the constitutional guaranties of due process and just compensation would become empty words.

The delineation of the doctrine of sovereign immunity as applied to state agencies is of importance to the public. See *American Hospital Supply Corp.* v. *York County Institutional District,* 123 F. Sup. 187 (decided July, 1954) and *Lowes* v. *Pennsylvania Turnpike Commission,* 125 F. Sup. 681. Particularly is this so in modern times when Turnpike Authorities, Port Authorities, Drainage and Reclamation Districts and other administrative boards wield an ever increasing impact upon the rights of the citizens.

WHEREFORE petitioner respectfully submits that the Writ of Certiorari issue that this Court may review the decision of the Supreme Court of Florida and determine whether that Court has deprived petitioner of rights guaranteed by the Constitutions of Florida and the United States.

Respectfully submitted,

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APPENDIX

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APPENDIX

On the 10th day of November, 1954, Second Amended Complaint was filed. This instrument omitting the Exhibits is in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. AT LAW

No. 14,377

JACK RABIN, d/b/a
JACK RABIN FARMS, *Plaintiff*,

v.

LAKE WORTH DRAINAGE DISTRICT, a general drainage district, *Defendant*.

Second Amended Complaint

COMES Now the plaintiff, by his undersigned attorneys, and sues the defendant, and says:

FIRST COUNT

1. That plaintiff is a resident of Palm Beach County, Florida, and that defendant is a general drainage district created under the laws of the State of Florida, Chapter 7556, Acts of 1917, for the primary benefit of the land owners within said district.

2. That beginning on the 11th day of August, 1953, and continuing at intervals on August 13, 18, 21 and 29th and September 25, 27 and 30th, plaintiff planted peppers on a portion of the following described farm lands located in Palm Beach County, Florida:

> Approximately 160 acres more or less, known as the New Farm, located in the SE¼ of Section 8, T 46 S. Range 42 East.

That on each of said dates a 2½ acre block of said farm lands was planted in peppers, making a total of approximately 22½ acres planted to peppers.

3. That said farm lands are bordered on the East by Canal #E-2, which runs in a North-South direction, and which is maintained and operated by the Lake Worth District as part of its drainage system.

4. That on or about the 10th day of November, 1953, the Lake Worth Drainage District, in the exercise of a proprietary or ministerial private function, caused said canal, bordering the above farm lands to be sprayed by a highly dangerous chemical herbicide, commonly known as 2, 4-D, in an effort to control the Hyacinth growth along said canal. That said herbicide 2, 4-D, was carried by wind drift upon pepper plants of plaintiff and also contaminated the water in the canal which flowed through the irrigation ditches traversing the said farm lands and which was being pumped into and onto said farm lands by the plaintiff.

5. That pepper plants are particularly susceptible to 2, 4-D, which stimulates abnormal growth by distorting the natural balance of growth processes.

6. That the Defendant knew, or should have known by the exercise of ordinary care and diligence, that said spraying would cause damage to the plaintiff's crop of peppers.

7. That no notice was given by said District of its spraying operations, on or about the date alleged and plaintiff had no knowledge thereof until after the damage was done.

8. That by reason of and as a direct result of defendant's carelessly and negligently spraying said germicide in close proximity to plaintiff's growing crop and allowing it to drift over and upon plaintiff's pepper plants, and to contaminate the water of said canal, which plaintiff was

using for irrigation as alleged, plaintiff's pepper crop was greatly retarded in maturity, and otherwise damaged. A bill of particulars of said damage is attached to plaintiff's original complaint and is incorporated herein.

9. That as a condition precedent to the formation of the Lake Worth Drainage District the owners of lands therein obligated and bound said lands to pay the expenses of maintaining the improvements, and the damages herein sustained by the plaintiff are a direct result of maintaining the improvements.

WHEREFORE, plaintiff sues defendant for the sum of Fifty Thousand ($50,000.00) Dollars, together with interest and costs of this action.

SECOND COUNT

The plaintiff re-alleges Paragraphs 1, 2 and 3 of the First Count of the Second Amended Complaint.

4. That on or about the 10th day of November, 1953, the Lake Worth Drainage District, as a part of its ministerial and proprietary duties in maintaining said district, and, in particular, said canal, attempted to clear the canal of obstruction caused by excessive hyacinth growth, and in so doing trespassed upon the pepper crop of the plaintiff by spraying a highly dangerous herbicide over and upon said pepper crop.

5. That as a direct result of said trespassing, plaintiff's pepper crop was greatly damaged. A bill of particulars of special damages suffered by the plaintiff is attached to the plaintiff's original complaint and is incorporated herein.

6. That as a condition precedent to the formation of the Lake Worth Drainage District the owners of lands therein obligated and bound said lands to pay the expenses of maintaining the improvements, and the damages herein

sustained by the plaintiff are a direct result of maintaining the improvements.

WHEREFORE, plaintiff sues defendant for the sum of Fifty Thousand ($50,000.00) Dollars, together with interest and costs of this action.

THIRD COUNT

The plaintiff re-alleges Paragraphs 1, 2 and 3 of the First Count of the Second Amended Complaint.

4. That on or about the 10th day of November, 1953, the defendant in maintaining said ditch did damage and take plaintiff's property, to-wit: his pepper crop, by spraying the same with a highly dangerous chemical herbicide known as 2, 4-D, and by contaminating the water then being used to sprinkle and irrigate said crop with said herbicide.

5. That the total market value of the plaintiff's property so taken is $38,953.78, a detail schedule of which is attached to plaintiff's original complaint and incorporated herein.

6. That the defendant has damaged and taken the plaintiff's property without just compensation contrary to Section 12 of the Declaration of Rights of the Constitution of the State of Florida and contrary to the Fourteenth Amendment, Section 1 of the Constitution of the United States.

7. That as a condition precedent to the formation of the Lake Worth Drainage District the owners of lands therein obligated and bound said lands to pay the expenses of maintaining the improvements, and the damages herein sustained by the plaintiff are a direct result of maintaining the improvements.

WHEREFORE plaintiff sues defendant for the sum of Fifty Thousand ($50,000.00) Dollars, together with interest and costs of this action.

WARWICK, PAUL AND WARWICK

JOHN A. PAUL
703 Citizens Building
West Palm Beach, Florida
Attorneys for Plaintiff

* * * * * * * * * * *

On the 17th day of December, 1954, the Court entered Order and Final Judgment which was filed same date at 3:15 P. M. and duly recorded in Minutes Circuit Court No. 66 at Page 352 in the words and figures following, to-wit:

Order and Final Judgment

This cause was duly presented by counsel for the parties.

IT IS ORDERED that the defendant's Motion to Dismiss the Second Amended Complaint be granted; that the Complaint be dismissed with prejudice; that judgment be and same is hereby entered for the defendant against the plaintiff, with costs taxed against the plaintiff.

Copy furnished counsel.

DONE AND ORDERED, this December 17, A. D. 1954.

C. E. CHILLINGWORTH
Circuit Judge

And thereafter on the 1st day of July, 1955, the Supreme Court of Florida rendered and filed its Opinion, which Opinion is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1955
DIVISION B.

Opinion filed July 1, 1955

An Appeal from the Circuit Court for Palm Beach County, C. E. Chillingworth, Judge

THOMAS, J.

The plaintiff, appellant here, filed a complaint against the Lake Worth Drainage District, appellee, alleging that he had planted peppers on land adjoining a canal maintained by the district and that the district in order to destroy the hyacinths in the canal caused the canal to be sprayed with a chemical herbicide which was blown upon the plaintiff's plants and which contaminated the water that the plaintiff used for irrigation of his farm, As a result of the operation the plaintiff's crop was retarded and, therefore, damaged, so it was charged. There were three counts in the complaint. One was based on negligence, one on trespass, and one on the unlawful taking of property.

It was averred that as a condition precedent to the formation of the district, the landowners in the district were obligated to pay the expenses of maintaining the improvements, Section 298.01, Florida Statutes 1953, and F.S.A., and that the damage to the plaintiff was the result of fulfilling the obligation. Judgment was asked for the amount of the loss.

The circut judge dismissed the complaint and entered judgment against the plaintiff and he appealed.

The appellant prefaces his argument by citing Section 12 of the Declaration of Rights of the Florida Constitution which vouchsafes to every person that he shall not be deprived of his property without just compensation and Section 4 of the Declaration of Rights providing that the

courts shall be open "so that every person for any injury done him in his lands, [or] goods, * * * shall have remedy, by due course of law * * *." But he is frank to say that he is faced with Section 22 of Article III of the Florida Constitution, stipulating that "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating," with the lack of such legislation, and with the decision in *Arundel Corporation, et al* v. *Griffin, et al.*, 89 Fla. 128, 103 So. 422.

We are met with the pivotal question whether or not a drainage district, such as appellee, may be sued in tort. It seems that no statute of this State authorizes an action like the one here involved. The appellant insists that the guarantees of the Constitution are self-operative, while the appellee contends that no right of action can be implied.

To support his position the appellant cites authorities of other states holding, in effect, that the Constitutional inhibition against the unlawful taking of property for public use is not dependent upon legislative sanction because the legislature cannot abrogate a constitutional right, *Tomasek* v. *State*, 196 Or. 120, 248 Pac. 2d 793; that " 'a constitutional provision' " that private property shall not be taken for public use without just compensation " 'shall never be construed as dependent for its efficacy and operation upon the legislative will.' " *Chick Springs Water Co.* v. *State Highway Department*, 159 S.C. 481, 157 S. E. 842. *Swift & Company* v. *City of Newport News*, 105 Va. 108, 52 S. E. 821.

He also cites decisions from the supreme courts of Virginia, Nebraska and Georgia, but the constitution of each of these states contains express prohibition against "damage" to private property, without just compensation, a protection that does not, in terms, appear in the Constitution of Florida. Section 12, Declaration of Rights, *supra*.

We prefer the logic of the decisions that districts such as appellee are not responsible in tort actions in the absence of legislative authority for bringing suit against them and, by adopting the reasoning of the courts that rendered such decisions, we think a determination of the present controversy will harmonize with our opinion in *Arundel Corporation, et al,* v. *Griffin,* 89 Fla. 128, 103 So 422.

In *Todd* v. *Kaw Valley Drainage Dist., Wyandotte County,* 109 Kan. 754, 201 Pac. 1096, the court was dealing with an action by a workman against a drainage district, for injury alleged to have been suffered as a result of the negligence of his foreman while they were engaged in clearing the channel of a river. The organization of the district and the purpose of the organization were not unlike the creation and purpose of Lake Worth Drainage District. The court ruled point-blank that the district was a governmental agency upon which no liability for tort rested "there being no specific statutory provision to modify the general rule [of non-liability]."

Of like tenor was the decision of the Supreme Court of Arkansas in Board of Improvement of Sewer District No. 2 of Ft. Smith v. Morland, 94 Ark, 380, 127 S. W. 469. The sole question was the liability of a sewer district for the death of a workman, said to have resulted from the negligence of the district, while he was engaged in constructing a sewer. The court styled such districts governmental agencies or public quasi corporations which are " 'purely auxiliaries to the state' " with no " 'powers, duties or liabilities except as conferred expressly by statute.' "

To the same effect is the opinion of the Supreme Court of Illinois in *Elmore* v. *Drainage Commissioners,* 135 Ill. 269, 25 N. E. 1010.

In the case of *Arundel Corporation, et al.,* v. *Griffin, et al., supra,* this court was considering an action that had been brought against a corporation and the Board of Com-

missioners of Everglades Drainage district for damages averred to have been caused plaintiffs by negligent drainage operations. The pivotal questions were whether or not the Board of Commissioners was subject to suit for tort, and whether or not the plaintiffs' lands had been taken for public purposes without compensation. The board was termed an agency of the state and a public quasi corporation and even though the board had been given the power to sue and be sued it was held that it was not responsible in tort, the court reasoning that if the State cannot be sued without its consent, and a county is not liable in tort for damages, an action against the board, a state agency, could not be maintained without legislative authority.

We revert to the decisions upon which the appellant relies to support his contention that his property has been taken without just compensation. In these cases the view was expressed that the constitutional guaranty that one's property may not be so taken cannot be thwarted by the lack of legislative authorization. It seems to us that this point was settled in this state thirty years ago, in the *Arundel* case, *supra*. Aside from the commitment of this court to the principle that the state or an agency of the state may not be sued without the state's consent, the provision that property shall not be *taken* does not seem to us apropos of the fundamental question with which we are now concerned. Appellant's crop was not *taken* by the state agency, *Miller et al.* v. *City of Palo Alto*, 208 Cal. 74, 280 P. 108; it was destroyed and the destruction, if negligent, constituted a tort. And it is the tort for which the appellee is not under the law responsible because it was acting in a governmental capacity as a public corporation. Section 298.02, Florida Statutes 1953, and F.S.A.

The provision of the Declaration of Rights appropriate to this discussion is the mandate that courts shall be open, so that every person shall have remedy for injury done his property. But we cannot find the distinction between

the application of that guaranty to cases where counties, cities and the Everglades Drainage District are involved and to a case like this one. If the doors of the court must now be opened to appellant they should have, by the same token, been required to be opened in the many cases reaching this court where cities and towns were held not liable despite the merits of the plaintiff's claims. *Wilford* v. *City of Jacksonville Beach, Fla.*, 79 So. 2d 516.

Another allied question is inherent in this record, that is the practical problem of collecting. If the appellant were held to have the constitutional right to proceed and he obtained a judgment how would he go about collecting it? The district has the power only to assess against lands within its boundaries assessments to accomplish an over-all drainage operation to make the lands within the whole area cultivable and keep them so. The assessments for main and subsidiary canals are made against the individual parcels of lands according to the benefit each parcel will receive from the project as a whole. Hearings are conducted so that any property owner aggrieved by the assessment may be heard. The financing of the improvement is based on the total assessment, the obligation undertaken to construct the project is discharged from the assessments paid. How could the district be coerced to pay any judgment obtained in a tort action except on the theory that by the commission of the tort the lands in the district were benefited? *Campbell et al.* v. *State ex rel. Garrett et al.*, 133 Fla. 638, 183 So. 340. This is so nebulous as not to warrant further exploration.

We are firm in the view that the appellant cannot prevail.

Affirmed.

DREW, C. J., and HOBSON, J., Concur
THORNAL, J., Concurs specially

THORNAL, J., Concurring Specially:

I concur in affirmance for the reason announced by the concluding paragraph of the main opinion. The General Drainage District Act, Chapter 298, Florida Statutes, authorizes the levying of taxes for specific purposes stipulated in the Act. These are limited strictly to the improvement and maintenance of the drainage district and the taxing power of the Board of Supervisors cannot be exercised for any other purpose—general or special. See *Campbell, et al.* v. *State,* 133 Fla. 638, 183 So. 340. To this extent it can safely be concluded that it was not contemplated by the Legislature that a drainage district organized under the Act could be compelled to respond in damages for a tort or forced to levy taxes for this purpose.

I do not agree that a drainage district under Chapter 298, supra, is either a state agency or is entitled to enjoy the immunities granted to state agencies. This is so primarily because the method of electing the Board of Supervisors under Sections 298.11 and 298.12, Florida Statutes, does not meet the requirements of Article III, Section 27, for selecting State officers. In my view such a district is more nearly a municipal organization rather than an agency of the State. See *Ronald* v. *Ryan* (Fla. 1946), 26 So. 2d 339. The case of *Arundel Corporation, et al.* v. *Griffin, et al.,* 89 Fla. 128, 103 So. 422, dealt with the Board of Commissioners of the Everglades Drainage District under Chapter 6456, Acts of 1913. This board consisted of five elected members of the state cabinet who were constitutional state officers.

For the reason stated above, however, I concur in the conclusion for affirmance.

On the 11th day of July, 1955, appellant filed in the Supreme Court of Florida his petition for rehearing in the words and figures following, to-wit:

Petition for Rehearing

* * * * * * * * * *

2. The Court in holding the Lake Worth Drainage District to be a State Agency has overlooked or failed to consider that in so holding this brings into effect Article V Constitution of the United States which provides "nor shall private property be taken for public use, without just compensation", and in interpreting the meaning of property under the Federal Constitution, damage to property as alleged here is uniformly held to be within the protection of the Fifth Amendment, and it is not confined to a taking in the narrow sense.

U. S. v. *Pewee Coal Co.* 71 S. Ct. 670, 95 L. Ed. 809.
Pumpelly v. *Green Bay and Miss. Canal Co.* 13 Wall, 166, 80 U. S. 166, 20 L. Ed. 557.
Coates v. *U. S.* 93 F. Supp. 637.

3. The Court in its opinion overlooked or failed to consider that in interpreting the meaning of the term "property", under the Fifth and Fourteenth Amendments to the Constitution of the United States, decisions of the Supreme Court of the United States are paramount and binding.

U. S. v. *Causby,* 66 S. Ct., 1062, 90 L. Ed. 1206.
U. S. v. *Powelson,* 319 U. S. 279, 63 St. Ct. 1064, 87 L. Ed. 1390.

* * * * * * * * * *

On the 16th day of September, 1955, the Supreme Court of Florida rendered its Opinion on the rehearing granted, which Opinion is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1955
EN BANC.

Opinion filed September 16, 1955

An Appeal from the Circuit Court for Palm Beach County, C. E. Chillingworth, Judge

On Rehearing Granted

PER CURIAM.

A rehearing having been granted in this cause and the case having been further considered upon the record and upon briefs and argument of counsel for the respective parties; it is thereupon ordered and adjudged by the Court that the opinion of this Court filed July 1, 1955, be and it is hereby reaffirmed and adhered to on rehearing.

DREW, C. J., TERRELL, THOMAS, SEBRING, HOBSON, ROBERTS and THORNAL, JJ., Concur.

Florida Statutes, 1941

Pertinent Sections of the General Drainage Act

298.01 FORMATION OF DRAINAGE DISTRICT

"The board of drainage commissioners of this state, or majority of the owners, or the owners of a majority of the acreage of any contiguous body of wet or overflowed lands or lands subject to overflow, situate in one or more counties in this state, may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, for sanitary or agricultural purposes, or when the same may be conducive to the public health, convenience or welfare, or of public utility or benefit, by drainage or otherwise; and for that purpose the said board of drainage commissioners, or a majority of the owners, or the owners of a majority of the acreage of said lands may make and sign a petition, in which shall be stated the name of the proposed drainage district and

the number of years the same is to continue; the boundary line of the proposed drainage district; the names so far as known, and the last known post office address of the owners of lands or other property in said district, together with a general description of the lands and the approximate number of acres owned by each; when the name or post office address of the owner of any of said lands or other property is unknown this fact shall be set out in said petition; the petition shall further state that the owners of the lands within said district, whose names are subscribed to said petition, are willing to and do obligate and bind the lands owned by them situated in the proposed drainage district to pay the tax which may be assessed against their respective lands to pay the expense of organizing and of making and maintaining the improvements that may be necessary to effect the reclamation of said lands, so formed into a drainage district, and to drain and protect the same from the effects of water; the petition shall contain a prayer, asking that the lands described therein be declared a drainage district under provisions of this chapter; the petition may be signed by the board of drainage commissioners, or by a majority of the owners, or the owners of a majority of the acreage of said lands, or same may be signed by both commissioners and owners of lands. After the petition has been so signed, the same shall be filed in the office of the clerk of the circuit court of the county in which such lands, or the greater part thereof, are situate."

298.02 Notice of Application to Form Drainage District

"Immediately after the petition shall have been filed, the clerk in whose office the same has been filed, shall give notice by causing publication to be made once a week for four consecutive weeks in some newspaper published in each county in which lands and other property described in the petition are situate, and said notice shall be substantially in the following form:

Notice of Application to Form a Drainage District

Notice is hereby given to all persons interested in the following described lands in ..... county,

Florida, viz.: (Here describe the property as set out in the petition) ..... that a petition asking that the foregoing lands be formed into drainage district under chapter 298, of the Florida Statutes, has been filed in this office, and that the foregoing lands will be affected by the formation of said drainage district and rendered liable to taxation for the purpose of paying the expenses of organization, and making and maintaining the improvements that may be necessary to affect the reclamation of the lands included in such district, and you and each of you are hereby notified to appear on the first rule day occurring not less than twenty days after this notice has been published for four weeks as required by said chapter, at the office of the clerk of the circuit court of ..... county, and show cause, if any there be, why said drainage district, as set forth in said petition, shall not be organized as a public corporation of the State of Florida.

Date of first publication ....., 19.... ..... Clerk of the Circuit Court of ..... County, Florida.

The certificates of the clerk or the affidavit of another, with a copy of said notice affixed, showing that said notice has been published as required by this chapter, shall be sufficient evidence of such fact.

The circuit court of the county in which the petition has been filed shall thereafter maintain and have original and exclusive jurisdiction, coextensive with the boundaries and limits of said district, without regard to county lines, for all purposes of this chapter."

298.03 Objections to Formation of District; Hearing; Decree Incorporating District Filed; Decree Filed in Counties Affected

"Any owner of lands in the proposed district, who may not have signed the petition, may appear, on or before the rule day stated in the notice, and advocate or resist the organization and incorporation of said drainage district; if he shall desire to resist the establishment of the district, he shall file his objection in writing, stating therein his reasons why the said drainage district should not be organized and incor-

porated or why his lands or any part thereof should not be included therein, or he may deny the statements in said petition. Such objections, if any there be, shall be heard by the court either in term time or vacation in a summary manner, without unnecessary delay, on a day to be named by the court or judge thereof, upon application of the petitioners or any of those signing the said petition. Upon the hearing, which may be adjourned, from time to time, for good cause shown, of the said objections, if any have been filed, if the court shall be of the opinion that the establishment of the said drainage district and the improvements to be made thereunder will be for the advantage of the owners of the real property therein or that the same would be in the interest of the public health, convenience or welfare, he shall overrule said objections; and, in case all such objections are overruled, or in case no such objections have been filed, the court thereupon shall, by its order duly entered of record, declare and decree said drainage district a public corporation of this state, for a term not exceeding the time mentioned in said petition; provided, that no drainage district shall be established or consolidated under any provisions of this chapter until there shall have been first obtained the written approval or consent of the owner or owners of a majority in acreage of the lands within said district. If the court finds that the lands set out in said petition should not be incorporated into a drainage district, it shall dismiss said proceedings and adjudge the costs against the said petitioners in proportion to the acreage represented by each. Any person having signed the petition shall have no right to have such proceedings dismissed as to him without the written consent of the other owners of a majority in acreage who signed said petition. The petition may be amended as any other pleading. Immediately after the said district has been declared a corporation by the court, the clerk thereof shall transmit to the secretary of state a certified copy of the findings and decree of the court incorporating said district, and the same shall be filed in the office of the secretary of state. A copy of said finding and decree, together with a plat of the district, shall also be filed in the office of

the clerk of the circuit court in each of the counties having land in said district, where the same shall become a permanent record, and each such clerk shall receive a fee of one dollar for filing and preserving the same."

298.23 Supervisors Given Power to Take Land for Right of Ways, etc.; Payment, etc.

"The board of supervisors of drainage districts organized under this chapter shall not have the right to enter upon, or appropriate, any land for right of ways, holding basins or other works of the districts, until the prices awarded to the owners of such land shall have been paid to such owners, or into the hands of the clerks of the circuit courts organizing such districts for the use of such owners; and if the sums awarded be not so paid within five years from the date of filing the commissioner's reports, all proceedings as to the taking of such property for right of ways, holding basins and other works, not so paid for, shall abate at the cost of said district. Whenever any land is acquired by any district under the provisions of this chapter and the price of such property has been paid the owner by the district, the title, use, possession and enjoyment of such property shall pass from the owner and be vested in the district, and subject to its use, profit, employment and final disposition. The price awarded for all lands acquired by any district for right of ways, holding basins, or other works, and the amount of damage assessed by the board of commissioners and confirmed by the court to any tract or parcel of land or other property in the district, shall be paid in cash to the owner thereof or to the clerk of the court for the use of such owner, and that portion of any tract or parcel of land not taken for use of the district shall be assessed for the benefits accruing in accordance with the provisions in this chapter."

298.29 Levy of Taxes; Collection of Taxes; Supervisors May Borrow Money and Issue Negotiable Papers

"The board of supervisors of any drainage district organized under the provisions of this chapter shall, as

soon as they have organized, as provided under Sec. 298.14, levy a uniform tax, of not exceeding fifty cents per acre upon each acre of land within such drainage district, as defined in the petition and decree incorporating said district; to be used for the purpose of paying expenses incurred, or to be incurred, in organizing said district, making surveys of the same and assessing benefits and damages, and to pay other expenses necessarily incurred, as may be estimated by said board and chief engineer; before said board may, by provisions of this chapter, provide funds to pay the total costs of works and improvements of the district. In case the boundary lines of the district be extended, under the provisions of this chapter, so as to include lands not described and contained in the petition, the same uniform assessment shall be made on such other lands as soon as same shall have been annexed and included in the district. Such shall be due and payable as soon as assessed and become delinquent ninety days thereafter. It shall become a lien upon the land against which it is assessed from the date of assessment, and shall be collected in the same manner as the annual installment of tax. In case the sum received for such assessment exceed the total cost of items for which the same has been levied the surplus shall be placed in the general fund of the district and used to pay cost of construction; provided, that if the corporation of the district be dissolved, as provided in this chapter, the amount of surplus, if there be any, shall be prorated and refunded to the landowners paying such assessment; * * *"

JAN 12 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 570

JACK RABIN, doing business as JACK RABIN FARMS,
Petitioner,

v.

LAKE WORTH DRAINAGE DISTRICT, a general drainage district, *Respondent.*

BRIEF OF RESPONDENT, LAKE WORTH DRAINAGE DISTRICT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 570

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LAKE WORTH DRAINAGE DISTRICT, a general drainage district, *Respondent.*

BRIEF OF RESPONDENT, LAKE WORTH DRAINAGE DISTRICT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner filed a complaint against respondent, The Lake Worth Drainage District. The theory of the complaint is that the District, in order to clean hyacinths from one of its canals, caused the hyacinths to be sprayed with a herbicide; that the spraying was so negligently done that the herbicide was blown on petitioner's pepper crop which was thereby injured.

Petitioner does not present a case where the injury arose because of any direct positive act of the District to purposely injure the pepper crop, but rather a case of an unintentional injury which resulted from an act of its servants in cleaning its canal in a negligent and improper manner, an act which in itself was lawful to do and which was their duty to do. The complaint against the District is not because of the fact that it used the herbicide to clean the canals but rather because of the manner in which the herbicide was applied; that is, the damage resulted, as alleged, "by reason * * * defendant's carelessly and negligently spraying said germicide in close proximity to plaintiff's growing crop and allowing it to drift over and upon plaintiff's pepper plants."

ARGUMENT

POINT ONE

THE PETITION PRESENTS NO FEDERAL QUESTION

Petitioner sues the respondent, District, on account of a simple act of negligence of its employees. The District in having its canals cleaned was not committing a wrong per se. It was not only the District's right, but its duty to clean its canals as a part of its maintenance work. The District was required by law to maintain its canals. If its servants in cleaning the canal for the District should do so in such a careless and negligent manner as to injure near-by property, the wrong is that of the servant and not that of the District. If the District were a private corporation, it could be held liable for the negligence of its servant under the doctrine of respondeat superior, but that doctrine does not apply where the master is a state agency in the performance of a governmental function.

The Supreme Court of Florida in its opinion 82 So. (2) 353 (Adv. Sheet So. Rep. Oct. 20, 1955, Petitioner's App. 6 a) holds that the respondent, District, was acting in a governmental capacity as a public corporation and could not be sued for the tort as presented by petitioner's complaint. The case presented is one simply where petitioner seeks to visit upon the District, a public corporation, in the performance of its governmental function a charge of negligence committed by its servants. In other words, petitioner seeks to hold the District liable, not for its own act, but for the negligent act of its servants under the doctrine of respondeat superior. In such case the District is not liable on the same theory that a municipality is held not to be responsible for the negligence of its policemen, jailors, firemen and other agents performing governmental duties.

See *Hopkins* v. *Clemson Agricultural College,* 22 U. S. 636; 31 S. Ct. 654; 55 L. Ed. 80.

The Supreme Court of Florida does not hold that respondent, District, could not be sued in any case, but its ruling of immunity goes only to the case presented by petitioner. If petitioner had presented a case where the District had taken petitioner's property for a public purpose without due process, unquestionably the Court would have held that the District was not immune from suit.

POINT TWO

PETITIONER DOES NOT SHOW A CASE WHERE ANY OF HIS PROPERTY WAS TAKEN BY THE DISTRICT

The case of *State Road Department* v. *Tharp,* 1 So. (2) 868, 146 Fla. 745, cited by petitioner (p. 8) clearly illustrates this point. It presents this situation.

Tharp had a water mill which he had owned and operated as a grist mill, a saw mill and shingle mill for many years. When the water left the mill it flowed through a swamp area in five channels. The State Road Department erected a bridge and fill west of the mill. The fill completely obstructed four of the five channels and thereby raised the elevation of the water in the mill race at least three feet, reducing the capacity of the mill fifty percent. The Supreme Court of Florida held that the state agency could not deliberately trespass upon and destroy Tharp's property. Thus, Tharp's property was clearly taken by a state agency, which taking was deliberate and intentional. The damage flowed directly and proximately from the act of the state agency and not merely from negligence of a servant committed without the intention, knowledge or consent of the state agency, as is the case now presented by petitioner. In other words, it was an act of the state agency itself, as distinct from a mere act of the servant himself done without the knowledge and consent of the state agency.

Petitioner, however, presents no such case as the *Tharp* case. There was no intent on the part of respondent, District, to injure petitioner's pepper crop, and the injury did not flow naturally and proximately from the District's order to clean the canal. There was no direct, positive, active and intentional injury so as to stamp the taking as that of the state agency itself as in the *Tharp* case; but, on the contrary, petitioner presents a case only where the District's servants committed an unauthorized act of negligence. If the District's servant in operating one of its trucks had operated it so negligently and carelessly as to run it into and wreck petitioner's

automobile, could it be said that the District was guilty of taking petitioner's automobile for a public purpose? And in such case the District could not be held liable for the destruction of the automobile as could a private corporation under the doctrine of respondeat superior. If there were a taking in such case, it would be the servant who did the taking, and undoubtedly the servant could be made to respond in damages. Although the servant would be driving the truck under orders of the District, he would not have orders to drive its truck into petitioner's automobile; hence, the negligent act of the servant would not be the act of the District. How could it be said, then, in such case, that a state agency is liable for taking the automobile for a public purpose because of the unauthorized act of its servant? This hypothetical case is clearly illustrative of petitioner's case in seeking to hold the District liable for the unauthorized acts of its servants. The District authorized its servants to clean the ditches but it did not authorize them to injure petitioner's property, and, as for that matter, it is not shown that the District directed the manner of cleaning the canal by the use of the herbicide.

All the cases presented by petitioner holding that there is an unlawful taking are cases where the act causing the injury was done under the direct authority of the state agency; and we find no case holding that a state agency is guilty of taking private property where the private property was injured solely by the negligence of a servant when the negligence is the unauthorized act of the servant and committed by him without the knowledge, consent or authority of the state agency, as is the case presented by petitioner. In other words, the injury must naturally and proximately

flow from the act which the state agency ordered and directed, and, if the injury does not naturally and proximately flow from that act itself but naturally and proximately flows only from the negligence of the servant in performing the act, then the injury results only from the negligence of the servant and does not result from the act ordered by the state agency, and the state agency would not be held liable, because there would be no taking by the state agency.

POINT THREE

NO FEDERAL QUESTION WAS PRESENTED TO THE TRIAL COURT IN THE PLEADINGS OF PETITIONER

True, paragraph 6 of the third count of petitioner's complaint alleges that defendant has damaged and taken plaintiff's property without just compensation contrary to Section 12 of the Declaration of Rights of the Constitution of the State of Florida and contrary to the Fourteenth Amendment, Section 1, of the Constitution of the United States; but this is but a conclusion of the pleader. The complaint does not show facts from which the Court could say that there was a taking; and the Supreme Court of Florida construed it as failing to show a taking, holding that "Appellant's crop was not *taken* by the state agency" (82 So. (2) 353, Adv. Sheet Southern Reporter, October 20, 1955. Petitioner's Appendix 6 a). If the Court construed the pleading as failing to show a taking, that ruling presents nothing but a rule of local pleading not subject to review by a Federal Court.

> See *Washington* v. *Miller,* 235 U. S. 422; 35 S. Ct. 119; 59 L. Ed. 295.

It is only in the third count of petitioner's complaint that he makes any pretense of presenting or attempts

to present a "federal question", and that third count is so vague, indefinite and so lacking in essential averments that no court can read it and say that a "federal question" is involved in petitioner's case; hence, the trial court dismissed it and the Supreme Court ignored the third count in its opinion.

(Respondent, District's motion to dismiss presented to the trial court is not shown by petitioner; hence this Court cannot determine the grounds of dismissal.)

Petitioner's complaint is wholly insufficient as a pleading to raise a "federal question".

The rule of pleading in such case is clearly stated and sustained by authorities cited in Hughes Federal Practice, Volume 1, page 400, paragraph 543, as follows:

> "The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of his own allegations. To present a 'federal question', the facts averred must show clearly and distinctly that the suit arises under some federal law; that is to say, that a federal question does arise must appear from the plaintiff's statement of facts in legal and logical form, such as is required by good pleading, showing the plaintiff's cause of action, without regard to what may be the contentions or claims of the defendant, and such facts must be stated as to enable the court to draw the legal conclusions and determine the question of jurisdiction in the affirmative."

And see the case of *Hull* v. *Burr*, 234 U. S. 712; 34 S. Ct. 892; 58 L. Ed. 1557, where the rule is thus stated:

> "* * * The rule is firmly established that a suit does not so arise unless it really and

> substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal law."

See also the case of *St. Joseph & Grand Island R. Co.* v. *R. M. Steel*, 167 U. S. 659; 17 S. Ct. 925; 42 L. Ed. 315, where it is said:

> "Not every mere allegation of the existence of a federal question in a controversy will suffice for that purpose. There must be a real substantive question, on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive. Hanford v. Davies, 163 U. S. 273, 279 [16 S. Ct. 1051, 41 L. Ed. 157]."

Raising a "federal question" for first time in petition for rehearing will not suffice.

> *American Surety Co.* v. *Baldwin*, 287 U. S. 156; 53 S. Ct. 98; 77 L. Ed. 231; 86 A.L.R. 298.

POINT FOUR

THE STATE CASES CITED BY PETITIONER HAVE NO BEARING ON THE POINT

Petitioner cites cases from other states. He seems to present these to sustain the position that the opinion of the Supreme Court of Florida is not supported by the weight of authority. These cases do not present any Federal question nor are they cited in support of

any Federal question but merely in criticism of the wisdom and soundness of the opinion of the Supreme Court of Florida. Absent any Federal question, the Supreme Court of the United States is not concerned with the soundness or wisdom of the decision of the Supreme Court of Florida. Absent any Federal question the decision of the Supreme Court of Florida is final without regard to the decisions of other states. It is the law of Florida.

CONCLUSION

Respondent concludes that petitioner presents no Federal question, does not show a taking of his property for any purpose, and no reason is shown for reviewing the decisions of the state courts of Florida.

Respectfully submitted,

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